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COMMISSION ON CRIME PREVENTION AND CRIMINAL JUSTICE
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STRENGTHENING EXISTING INTERNATIONAL COOPERATION IN CRIME PREVENTION AND CRIMINAL JUSTICE, INCLUDING TECHNICAL COOPERATION IN DEVELOPING COUNTRIES, WITH SPECIAL EMPHASIS ON COMBATING ORGANIZED CRIME

Note by the Secretary-General

Addendum

Conclusions and recommendations of the International Expert Group Meeting for the Elaboration of a Model Treaty on the Transfer of Enforcement of Penal Sanctions, Siracusa, 3-8 December 1991

1. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in its resolution 28, 1/ invited Member States to take further steps to improve the methods of international cooperation in criminal matters by considering the conclusion of agreements for the transfer of enforcement of penal sanctions. The Secretary-General was called upon to provide or facilitate the provision of professional advice and technical support at the request of Member States that are interested in concluding such agreement and to encourage international collaboration in research with a view to the transfer of enforcement of penal sanctions. Finally, the Congress requested the Committee on Crime Prevention and Control to consider this question and the possibility of the formulation of a model agreement thereon, with a view to submitting it to the Ninth Congress for further deliberation.

2. The General Assembly, in its resolution 45/121, inter alia, welcomed this resolution of the Congress.

3. In accordance with this mandate, the draft model treaty contained in annex I was elaborated by an international expert group meeting on the elaboration of a model treaty on the transfer of enforcement of penal sanctions, organized by the International Institute of Higher Studies in

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Criminal Sciences and the International Association of Penal Law, in cooperation with the United Nations Secretariat, and held at Siracusa from 3 to 8 December 1991. The list of participants in the Meeting is set out in annex II.

4. The Expert Group expressed its conviction that the model treaty, when finalized, would provide a useful framework that could be of assistance to States interested in negotiating and concluding bilateral agreements to improve cooperation in matters of crime prevention and criminal justice. The importance of such a model treaty as an effective way of dealing with transnational crime was recognized as a useful complement to the work already accomplished in related areas, namely the model treaties on extradition, mutual assistance in criminal matters, transfer of proceedings in criminal matters and transfer of supervision of offenders conditionally sentenced or conditionally released (see General Assembly resolutions 45/116, 45/117, 45/118 and 45/119), as well as the Model Agreement on the Transfer of Foreign Prisoners. 2/

Notes

1/ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990 (United Nations publication, Sales No. E.191.IV.2), chap. I, sect. C.

2/ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.

Annex I

DRAFT MODEL TREATY ON THE TRANSFER OF ENFORCEMENT OF PENAL SANCTIONS

Preamble

The _____ and the _____

Desiring to improve ways and means of international cooperation in criminal matters,

Believing that such cooperation should further the ends of justice and the social settlement of offenders,

Considering that the transfer of enforcement of penal sanctions may contribute to greater effectiveness in the fight against crime,

Convinced, therefore, that the transfer of enforcement of penal sanctions should be encouraged,

Have agreed as follows:

ARTICLE 1

Scope of application

This Treaty applies to the following sanctions: a/

(a) Deprivations of liberty;
(b) Fines;
(c) Confiscations;
(d) Disqualifications.

ARTICLE 2

Definitions

For the purposes of this Treaty:

(a) "Deprivation of liberty" means any custodial punishment or measure imposed by a court in respect of a criminal offence;

(b) "Fine" means a punishment imposed by a court in respect of a criminal offence consisting in an obligation to pay a sum of money to the State; b/

(c) "Confiscation" means any punishment or measure imposed by a court in relation to a criminal offence resulting in the final deprivation of property;

(d) "Disqualification" means any loss or suspension of a right or any prohibition or loss of legal capacity imposed by a court in relation to a criminal offence; c/

(e) "Sentencing State" means the State in which the sanction in respect of which transfer of enforcement has been or may be requested was imposed;

(f) "Administering State" means the State to which enforcement of the sanction has been or may be transferred.

ARTICLE 3

Principles

1. Each State Party shall, in accordance with the provisions of this Treaty, have jurisdiction to enforce a sanction imposed in the other State Party. This jurisdiction may be exercised only following a request by the sentencing State.

2. Enforcement of the sanction requested in accordance with the provisions of this Treaty may not be refused, subject to the provisions of articles 5 and 6.

ARTICLE 4

Dual criminality

The transfer of the enforcement of a sanction shall be subject to the condition that the act or omission in relation to which the sanction was imposed would constitute an offence under the law of the administering State if committed in its territory.

ARTICLE 5

Mandatory grounds for refusal

The enforcement shall be refused:

(a) If the decision by which the sanction was imposed in the requesting State is not final and enforceable;

(b) If there are grounds for believing that the proceedings in the requesting State did not comply with the generally recognized principles on the protection of human rights; d/

(c) If there are grounds for believing that the sanction was brought about or aggravated by considerations of race, religion, nationality, ethnic origin, sex, status or political opinion;

(d) If, under the law of either state Party, the person has become immune from enforcement for any reason, including lapse of time;

(e) If there has been a final decision rendered against the person in the requested State in respect of the offence concerned or where the enforcement of the sentence would otherwise be contrary to its law on the prohibition of double jeopardy;

(f) If the sanction consists in a fine and the person concerned has no income or realizable property in the requested State;

(g) If the sanction is a confiscation and the law of the requested State does not allow such confiscation for the offence in question or the ordering of such confiscation in view of the remote relationship between the offence and the property concerned;

(h) If the sanction consists in a confiscation and the property to be confiscated or any other realizable property, including sources of income, is not available in the requested State;

(i) If the sanction is a disqualification and the law of the requested State does not allow such disqualification for the offence in question.

ARTICLE 6

Optional grounds for refusal

The enforcement may be refused:

(a) If the competent authorities of the requested State are instituting or have decided not to institute or to terminate proceedings in respect of the offence to which the request for the transfer of enforcement relates;

(b) If the offence in relation to which the sanction was imposed is a purely military offence, a fiscal offence, e/ or a political offence; f/

(c) If the offence was committed outside the territory of the requested State;

(d) If the requested State considers that, in the circumstances of the case, the enforcement of the sanction would be incompatible with international humanitarian considerations in view of the age, health or other personal circumstances of the person concerned;

(e) If the sanction consists in deprivation of liberty and the sentenced person is not a national of the requested State nor ordinarily resident in the requested State;

(f) If the sanction consists in a disqualification and the person concerned does not exercise the activities to which the disqualification applies primarily in the requested State.

ARTICLE 7

Reasons for refusal

Reasons shall be given for any refusal to comply with a request for transfer of enforcement.

ARTICLE 8

Communications

1. Requests for the transfer of enforcement shall be made in writing.

2. Requests, the supporting documents and any subsequent communications shall be transmitted through diplomatic channels, directly between the ministries of justice or any other authorities designated by the States Parties.

ARTICLE 9

Required documents

1. A request for the transfer of enforcement shall contain or be accompanied by the following information:

(a) Identification of the authority presenting the request;

(b) A duly certified copy of any decision whereby the sanction was imposed and a certificate that the decision is final and enforceable;

(c) A description of the act or omission that gave rise to the sanction of which transfer of enforcement is being requested, including indication of its time and place, if not already sufficiently contained in the decision itself mentioned under subparagraph (b) above;

(d) The provisions of the legislation of the sentencing State on the basis of which the act or omission is considered to be an offence;

(e) A description of the sanction of which transfer of enforcement is being requested;

(f) An indication of any part of such sanction that has already been enforced, of any period of provisional detention served and of any other matters of relevance for the enforcement of the sanction;

(g) A reasonably exact statement on the identity, nationality and residence of the person concerned;

(h) In case of requests for enforcement of confiscation, any information on the property that would be subject to such enforcement.

2. If the administering State considers that the information supplied by the sentencing State is not adequate to enable it to apply this Treaty, it shall ask for the necessary additional information. It may prescribe a date for the receipt of such information. g/

ARTICLE 10

Language

Requests for the transfer of enforcement and supporting documents shall be accompanied by a translation into the language of the administering State or into any other language acceptable to that State.

ARTICLE 11

Certification and authentication

Requests for transfer of enforcement and the supporting documents, as well as any documents presented in response to such a request, shall not require certification or authentication unless otherwise provided by this Treaty. h/

ARTICLE 12

Decision on the request

The competent authorities of the administering State shall consider what action to take on the request for transfer of enforcement, in order to comply with it in accordance with the law of that State. The administering State shall promptly communicate its decision on the request to the sentencing State. i/

ARTICLE 13

Provisional measures

Upon receiving a request for the transfer of enforcement, the administering State shall apply such provisional measures, including provisional detention and seizure, as would be applied under its law in similar circumstances if the offence in question had been committed in its own territory. j/

ARTICLE 14

Effects of the transfer for the sentencing State

1. The sentencing State may not proceed with the enforcement of a sanction consisting in the deprivation of liberty or a fine once the administering State has accepted the transfer. k/

2. The right to enforce a sanction shall revert to the sentencing State once the administering State informs it that it has revoked its acceptance or that it is not in a position to enforce the sanction or to enforce it fully.

ARTICLE 15

Effects of the transfer for the administering State

1. The competent authorities of the administering State shall:

(a) Continue the enforcement of the sanction immediately or through a court or administrative order, under the conditions set out in article 16; or

(b) Convert, through a judicial or administrative procedure, the sanction imposed in the sentencing State into a sanction prescribed by the law of the administering State for the offence in question, under the conditions set out in article 17.

2. The administering State, if requested, shall inform the sentencing State which of these procedures it intends to follow.

3. The administering State shall be bound by the findings as to the facts in so far as they appear explicitly or implicitly in the decision rendered in the sentencing State.

4. The person concerned may not be tried again in the administering State for the act or omission that gave rise to the sanction the enforcement of which has been transferred to it.

ARTICLE 16

Continued enforcement

1. In the case of continued enforcement, the administering State shall be bound by the legal nature and duration or amount of the sanction as determined by the sentencing State.

2. If, however, this sanction is by its nature, duration or amount incompatible with the law of the administering State, this State may adapt the sanction to the one prescribed by its own law for the offence in question. When adapting the sanction, the administering State shall ensure that the nature of the sanction corresponds, as far as possible, to that of the sanction imposed by the sentencing State. It shall not aggravate, by its nature, duration or amount, the sanction imposed in the sentencing State, or exceed the maximum prescribed by the law of the administering State.

ARTICLE 17

Conversion of the sanction

In case of conversion of the sanction, the administering State, while taking into due consideration the sanction imposed in the sentencing State, shall be entitled to substitute for the sanction imposed by that State a sanction of a different nature, duration or amount, subject to the following conditions:

(a) A sanction consisting in the deprivation of liberty of a period of more than six months shall not be converted into a fine;

(b) The conversion shall in no case aggravate the penal position of the person concerned. In particular, the administering State shall not be bound by any minimum which its laws may provide for the offence in question.

ARTICLE 18

Law governing the enforcement

1. The enforcement of the sanction shall be governed by the law of the administering State and that State alone shall be competent to decide on the procedures for enforcement and to determine all the measures relating thereto.

2. Any part of the sanction enforced in whatever manner in the sentencing State shall be deducted in full for the purposes of enforcement in the administering State.

ARTICLE 19

Information on enforcement

The administering State shall inform the sanctioning State:

(a) When it considers enforcement of the sanction to have been completed;

(b) When circumstances render it impossible to enforce the sanction partially or totally, in particular when the person concerned has escaped from custody.

ARTICLE 20

Fines and confiscations

1. For the purpose of enforcement of a fine or confiscation consisting in the obligation to pay a sum of money, the administering State shall convert the amount of the sanction imposed in the sentencing State into its currency at the rate of exchange ruling at the time when the decision on enforcement is taken.

2. Where a fine or confiscation consisting in the obligation to pay a sum of money cannot be enforced either totally or in part, an alternative custodial sanction can be applied by the competent authorities of the administering State if the laws of both States so provide in such cases, unless the sentencing State clearly excluded it.

3. The proceeds of fines and confiscations shall accrue to the public funds of the administering State, without prejudice to the rights of third parties. 1/

4. Property confiscated which is of special interest may be remitted to the sentencing State if it so requests.

ARTICLE 21

Review, pardon and amnesty

1. The sentencing State alone shall have the right to decide on any application for review of the decision.

2. Either Party shall be competent to grant pardon and amnesty or commute the sanction in accordance with its law.

3. The sanctioning State shall without delay inform the administering State of any decision or procedural measure adopted by it that causes the right of enforcement to lapse in accordance with the proceeding paragraphs.

4. The administering State shall terminate enforcement of the sanction as soon as it is informed by the sentencing State of any decision or measure as a result of which the sanction ceases to be enforceable.

ARTICLE 22

Costs

Unless the States Parties decide otherwise, the costs that may arise from the application of this Treaty shall not be refunded.

ARTICLE 23

Final provisions

1. This Treaty is subject to [ratification, acceptance or approval]. The instruments of [ratification, acceptance or approval] shall be exchanged as soon as possible.

2. This Treaty shall enter into force on the thirtieth day after the day on which instruments of ratification are exchanged.

3. This Treaty shall apply to requests made after the date of its entry into force, even if the relevant acts or omissions occurred prior to that date.

4. Either Contracting Party may denounce this Treaty by giving notice in writing to the other Party. Such denunciation shall take effect six months following the date on which the notification is received by the other Party.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed this Treaty.

_____ _____

Done at _____ on _____

in the _____ and _____

languages, [both texts] [all texts] being equally authentic.

Notes

a/ The Model Treaty is based on the assumption that it applies to sanctions imposed on natural persons. If negotiating States wish to extend its application to fines, confiscations and disqualifications imposed on legal persons, some specific provisions may have to be elaborated.

b/ Negotiating States may wish to include in the definition of "fines" the imposition of pecuniary sanctions by an administrative authority for regulatory or administrative offences, provided the person concerned has had the opportunity to bring the matter before a court through procedures meeting the necessary requirements of due process.

c/ Negotiating States may wish to include in the definition of "disqualifications" the disqualifications imposed by an administrative authority in relation to a criminal offence or regulatory or administrative offences, subject to the same conditions as those set out in the previous footnote.

Negotiating States may wish to structure the cooperation in the enforcement of disqualifications as a system of information by the sentencing State to the other State, leaving it to the discretion of the latter State to take any disqualifying measure of a similar or even of a different nature under its own law in respect of the person concerned.

d/ The grounds of refusal contemplated in this subparagraph may cover to some extent cases of refusal to enforce sanctions imposed by decisions rendered in absentia, in particular where the person concerned may be held to have been deprived of minimum rights of conducting the defence. Negotiating States may also wish to adopt a specific ground of refusal in that regard, specifying at the same time the cases where the enforcement of the sanctions thus imposed may be acceptable, for example:

"1. A decision is not considered to have been rendered in absentia if:

"(a) It has been confirmed or pronounced after opposition by the person concerned; or

"(b) It has been rendered on appeal, provided that the appeal was lodged by the person concerned.

"2. When considering if the minimum rights of defence have been satisfied, the requested Party shall take into account the fact that the person tried in absentia has deliberately sought to evade justice or the fact that the person, having had the possibility of lodging a legal remedy against the decision made in absentia, elected not to do so. The same will apply when the person concerned, having been duly served with the summons to appear, elected neither to do so nor to ask for adjournment."

e/ Negotiating States may wish to specify that fiscal offences may cover offences in relation to taxes, customs, duties, exchange and excise; in addition, they may wish to specify that fiscal offences do not include specific types of offences, such as money laundering, trafficking in cultural property, smuggling, trafficking in arms and explosives, and any other offence which constitutes an infringement of export-import laws and regulations, other than those arising essentially out of non-payment of duties and tariffs.

f/ Some countries may wish to use the following addition: "Reference to an offence of a political nature shall not include any offence in respect of which the Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, nor any other offence agreed by the Parties not to be an offence of a political character for the purposes of extradition."

g/ In cases where a sanction was imposed for two or more offences, and some of these would not fulfil the requirement of double criminality or would constitute a military, fiscal or political offence, the requested State may

wish to use this paragraph to find out which part of the sanction relates to offences for which it may be obliged to comply with the request for transfer.

h/ The laws of some countries require authentication before documents transmitted from other countries can be admitted in their courts and, therefore, would require a clause setting out the authentication required.

i/ It is likely that the procedure for the decision on the request would involve the intervention of the court, ex officio or by way of an individual recourse, in order to assess whether some or all the conditions to apply the Treaty are met, including conditions referring to fundamental principles of the national law for the protection of individual rights (for example protection against the use of unlawful means to procure the presence of the person in the territory of the administering State).

j/ Negotiating States may wish to include the possibility of provisional measures in cases where the requested State announces its intention to request enforcement of a sanction consisting in deprivation of liberty or confiscation prior to the submission of a formal request for enforcement. They may also envisage the possibility of complying with requests for seizure of property with a view to eventual confiscation, even before a final confiscation order has been issued in the requesting State. In those cases, special provisions would have to be envisaged pertaining to the necessary documentation.

k/ This paragraph does not apply to sanctions of confiscation and disqualification, since their enforcement in the administering State should not prevent their enforcement in the sentencing State. The States Parties should ascertain that the enforcement of a confiscation sanction would not result in the deprivation of more property or property of a higher value than specified in the decision imposing the sanction.

l/ Negotiating States may wish to agree on a different system of disposition, such as sharing the proceeds.

Annex II

LIST OF PARTICIPANTS

Experts

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